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In the Supreme Court of the United States

OCTOBER TERM

No. 72-1012

WESLEY PARKS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi (petitioner's appendix) is reported as *Parks* v. *State*, 267 So.2d 302 (Miss. 1972).

JURISDICTION

Jurisdictional prerequisites are adequately set forth in the petition.

QUESTION PRESENTED

Was the denial of the petitioner's motion for a change of venue an abuse of discretion which operated to deprive him of a trial by a fair and impartial jury?

STATEMENT OF FACTS

The petitioner, Wesley Parks, was indicted by the Grand Jury of Sunflower County, Mississippi, on a charge of the murder of one Joetha Collier on May 25, 1971. Under that indictment, the petitioner was tried in the Circuit Court of Sunflower County, found guilty of the crime of manslaughter, and was sentenced to a term of twenty years in the state penitentiary. The petitioner appealed said conviction to the Supreme Court of Mississippi, wherein the conviction and sentence were affirmed.

The crime for which petitioner stands convicted attracted a considerable amount of publicity, both local and national. The basic facts of the crime are substantially undisputed. The petitioner and two others were riding in an automobile down a street in the business district of Drew, Mississippi. The petitioner, a passenger in the vehicle, was armed with a 22-caliber pistol which he fired out of the window of the moving vehicle with the bullet

striking and killing one Joetha Collier who was standing with others on the sidewalk in front of a cafe. The petitioner is a white man. Joetha Collier was a teenaged colored female who had that day graduated from high school. Sunflower County, Mississippi, like most other Mississippi counties in that area, has a large percentage of negroes; in the case of Sunflower County, approximately fifty percent. The senseless killing of the young girl apparently caused a considerable amount of indignation and concern in both the white and black communities. The petitioner and his two companions, following their arrest, were held at the Mississippi State Penitentiary (also located in Sunflower County) instead of in the county jail at Indianola, Mississippi, because of some unrest in the negro community. The petitioner filed a motion for a change of venue on June 14, 1971, and that motion was denied by the Circuit Court of Sunflower County, but the court left the matter open for further review prior to trial. The motion for a change of venue was renewed, and a second hearing on the motion was had on October 18, 1971, with the court again overruling the motion. Petitioner went to trial on October 26, 1971.

The petitioner now seeks to have this court grant certiorari in order to determine whether he was deprived of his right to a trial by a fair and impartial jury resulting from a denial of motions for a change of venue.

ARGUMENT

There Was No Abuse of Discretion in the Denial of the Petitioner's Motion for a Change of Venue, and There Was Therefore No Denial of Petitioner's Right to a Trial by a Fair and Impartial Jury.

The rule, as it must necessarily be, is almost universally the same in state and federal court practice; that is, that rulings on motions for changes of venue are addressed to the sound discretion of the trial court, and the trial court's rulings will not be disturbed except upon a clear showing of abuse of discretion, e.g., *Miller* v. *U. S.*, 287 Fed. 864, certiorari denied, 43 S.Ct. 705, 262 U.S. 758, 67 L.Ed. 1219; *McGee* v. *State*, 40 So.2d 160, appeal dismissed, certiorari denied, 70 S.Ct. 77, 338 U.S. 805, 94 L. Ed. 487, rehearing denied, 70 S.Ct. 977, 399 U.S. 958, 94 L.Ed. 1369; *Golden* v. *State*, 71 So.2d 476, 220 Miss. 465; *Anderson* v. *State*, 152 So.2d 702, 246 Miss. 821; Fed. Rules of Criminal Procedure, Rule 21(a), 18 U.S.C.A.; *Kersten* v. *U. S.*, 161 F.2d 337, certiorari denied, 67 S.Ct. 1744, 331 U.S. 851, 91 L.Ed. 1859.

As a corollary to the rule cited above, there is, of course, the rule that in determining whether or not there has been an abuse of discretion, the appellate court will, as it necessarily must, look to the "totality of circumstances" in determining the issue.

What, then, are the "totality of circumstances" in this particular case?

It is manifest from the record, and from the brief in support of the petition filed in this court, that petitioner is relying on what he terms "reverse discrimination," and which he defines, in effect, as being a situation where the

negro community of Sunflower County was so infected with prejudice and ill will toward the defendant that a fair and impartial jury could not be obtained when at least a portion of the jury was certain to be made up of negroes.

One of the factors, of course, to be considered in matters such as this is whether or not it appears from the record that the petitioner did, in fact, receive a fair and impartial trial, even assuming, arguendo, that there was some degree of prejudice and ill will toward the defendant in the community.

There is no claim by the petitioner nor any indication in the record that any member of the trial jury was disqualified for any reason other than the assumption on the part of the petitioner that the nature and extent of the pretrial publicity and events necessarily infected the entire proceedings. The petitioner apparently did not request that the voir dire of the trial jury be taken, and there is no indication in the record as to whether or not it was necessary for the petitioner to exhaust all peremptory challenges. The only reference in the record as to the selection of the trial jury is as follows:

"(The Jury was selected during October 26, 1971 and October 27, 1971. The jurors, after being sworn, were instructed by the Court, then were given a short recess.)

"IN CHAMBERS, OUT OF THE PRESENCE AND THE HEARING OF THE JURY: (After selection of Jury, October 27, 1971)

"BY THE COURT:

"Let the record show that two hundred veniremen were drawn by the Court for a special venire in this

case. Of that number, sixty-nine were not served with summons; 131 were served with summons; of this 131, 29 were excused by the Court prior to empaneling the jury, for good cause shown; seven did not appear in Court; 95 of the special venire actually appeared in Court; of this number, 45 were excused by the Court for good cause shown, or were disqualified under the law from serving. Thirteen of this number were excused by the Court for having fixed opinions.

"There were 24 regular jurors for the week. Of this number, three were excused by the Court for good cause shown; 11 were excused by the Court for having fixed opinions. To obtain the jury of twelve plus the two alternates, the special venire and the 24 regular jurors for the week were exhausted, with the exception of six regular jurors for the week.

"The final composition of the regular jury of twelve is eight blacks and four whites. Alternate No. 1 is black; alternate No. 2 is white.

"MOTION"

"BY MR. DYER:

"Comes now the defendant, and considering the composition of the jury and considering the difficulty which the Court had in obtaining a jury of twelve, does now respectfully renew his Motion for a Change of Venue.

"BY THE COURT:

"The Court has had an opportunity to observe all these jurors and prospective jurors during the course of empaneling the jury, and the Court feels that a fair

and impartial jury has been empaneled. The Court is going to overrule the motion.

* * *

"(The Jury returned to the Courtroom, and all witnesses were sworn. The rule was invoked.)"

Respondent's analysis of the statistics is that of a total of 148 veniremen who were actually present in court, a total of 24 were excused by the court for having fixed opinions. This is approximately eighteen percent.

Respondent believes that the observation of the trial court that the court had observed the jurors and felt that a fair and impartial jury had been empaneled is entitled to great weight. Respondent further feels that this is particularly true when taken into consideration with the court's prior actions and observations on the two separate hearings afforded the petitioner on his motions for change of venue. After the first hearing, the court entered an order on June 17, 1971, wherein the first motion was overruled with the court expressing its opinion that a fair and impartial trial could be held. That order read as follows:

"IN THE CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI

"STATE OF MISSISSIPPI VS. NO. 7522 WESLEY PARKS, WAYNE PARKS AND ALLEN WILKERSON, DEFENDANTS

"ORDER

"This day this cause coming on for hearing on motion by the severed defendants, Wesley Parks, Wayne Parks and Allen Wilkerson, they being represented by counsel, for a change of venue and the court having heard and considered the same and evidence having

been had and adduced thereasto by the State and Defense, and the court being of the opinion that the defendants, Wesley Parks, Wayne Parks and Allen Wilkerson, can now be afforded a fair and impartial trial in Sunflower County, Mississippi, it is the opinion of this court that said Motion for Change of Venue should be and the same is hereby DENIED.

"ORDERED AND ADJUDGED, on this the 17th day of June, A. D., 1971.

"/s/ Arthur B. Clark, Jr., Circuit Judge"

Following the second hearing on the renewed motion for change of venue, the court ruled as follows:

"RULING OF THE COURT:

"I have heard the testimony and I have had an opportunity to observe the witnesses as they testified. I note that most of the witnesses for the defendants are from around Drew, and even some of those testified that they thought they could get a fair trial. The defendants presented very few witnesses from outside District 5, that is, the Drew community.

"I feel, after listening to this testimony, that these defendants can get a fair trial in this county. I am going to overrule this motion, but I want to say this to you gentlemen—as I recall, the Supreme Court has said that, in passing on a motion for a change of venue, whether or not the trial judge held correctly on that, they look at the entire record in the case. Now, I can assure you that when we start the trial of this case, I am going to question this panel very carefully, and if I find that a large percentage of that panel expresses a fixed opinion, I will probably reconsider the motion at that time. I just want you to know that I am de-

termined that these defendants are going to get a fair trial, and I will take another look at it when it comes time to select this jury.

"BY MR. DYER:

"Thank you, Your Honor."

The opinions expressed on the motions for a change of venue were, of course, conflicting. It appears from the remarks of the trial court that most of those testifying in favor of the motion were friends and/or neighbors of the petitioner and that petitioner's evidence did not reflect the feelings of a representative sample of a cross section of the population of the county.

It, therefore, appears manifest to respondent that the trial court at several points gave careful consideration to the motions for change of venue, and in the exercise of its sound judicial discretion, concluded that a fair and impartial trial could be afforded the petitioner in Sunflower County, Mississippi.

The crime and arrest of petitioner took place during the last week of May, 1971. The trial took place during the last week of October, 1971, or some five months later. That the passion over the commission of the crime generated in some elements of one part of the community in Sunflower County was no longer a factor is strongly indicated by the action of the petitioner himself. Following the arrest of the petitioner and his companions, they were taken and held in another area of the county; but on August 5, 1971, on motion of the defendants, they were transferred to the county jail at Indianola, Mississippi. This appears indicative that there was no longer any cause for concern as to their safety.

The respondent believes that another factor strongly, if not conclusively, supporting the proposition that the petitioner received a fair and impartial trial is the verdict of the jury finding him guilty only of manslaughter. The petitioner was indicted for murder. There was evidence on the trial of the case that the petitioner had pointed his weapon at at least one other colored person, and respondent believes that that, along with other factors in the case, would have been sufficient to support a conviction of murder. Nevertheless, a jury composed of eight blacks and four whites convicted the petitioner only of manslaughter, to which charge the petitioner, in effect, offered no defense whatsoever. Petitioner avers in his brief that the circumstances of this crime were such that a jury of reasonable men could have acquitted him. He bases this assertion on petitioner's claim during trial that he was unaware of the fact that the bullet he fired actually struck someone. That is, he claims that by such an assertion he thereby set up a defense of accident or misfortune. The undisputed facts in this case were that the petitioner fired a deadly weapon toward a group of people in a business district of a town, with said actions resulting in the death of one of those people. The element of intent under Mississippi law goes only to the murder charge and not to the manslaughter charge; and since the petitioner was given the benefit of the doubt as to his intent and found guilty only of manslaughter, respondent avers that under the circumstances of this case such a finding on the part of the jury is strongly persuasive evidence as to the fairness and impartiality of the said jury.

That the circumstances of the death of Joetha Collier attracted considerable publicity, both local and national, and that it caused indignation and tension in the community for a period of time cannot be disputed. How-

ever, the tenor of publicity surrounding these events was, in appellee's view, more conducive to encouraging the orderly processes of justice than to deny them. Where the reporting of the events was more than a simple factual presentation of the matter, it was more likely than not to be of the tenor of an article dated Thursday, June 3, 1971, published in the Sunflower County News, and which is attached hereto as Exhibit "A". In short, the pretrial publicity merely reported events and pictured a community which was concerned but one in which the overwhelming majority simply wished to see the normal processes of justice take place.

It is to be further noted that there is no claim nor indication of any improper or prejudicial action on the part of any public official.

This case does not in any way approach the factual or legal situation in those cases cited by the petitioner in support of his argument.

In *Grappe* v. *Wisconsin*, 400 U.S. 505, 27 L.Ed.2d 571, 91 S.Ct. 490, the question was not whether or not petitioner should have been granted a change of venue, but rather whether or not he was entitled to a hearing on a motion for a change of venue in the face of a Wisconsin statute denying a change of venue on a misdemeanor charge.

In *Irvin* v. *Dowd*, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639, the question therein was whether or not the petitioner was entitled to a second change of venue in the face of the Wisconsin statute limiting a defendant to one change of venue. There, the following factual situation is outlined:

> "It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and

fostered a strong prejudice among the people of Gibson County. In fact, on the second day devoted to the selection of the jury, the newspapers reported that 'strong feelings, often bitter and angry, rumbled to the surface,' and that 'the extent to which the multiple murders—three in one family—have aroused feelings throughout the area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions. . . .' A few days later the feeling was *described as 'a pattern of deep and bitter prejudice against the former pipe-fitter.' [*366 US 727] Spectator comments, as printed by the newspapers, were 'my mind is made up'; 'I think he is guilty'; and 'he should be hanged.'

"Finally, and with remarkable understatement, the headlines reported that 'impartial jurors are hard to find.' The panel consisted of 430 persons. The Court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were peremptorily challenged by the petitioner and 10 by the State; 12 persons and two alternates were selected as jurors and the rest were excused on personal grounds, e.g., deafness, doctor's orders, etc. An examination of the 2,783-page voir dire record shows that 370 prospective jurors or almost 90% of those examined on the point (10 members of the panel were never asked whether or not they had any opinion) entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty. A number admitted that, if they were in the accused's place in the dock and he in theirs on the

jury with their opinions, they would not want him on a jury.

"Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community, cf. Stroble v California, 343 US 181, 96 L ed 872, 72 S Ct 599, was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations."

The factual situation in *Rideau* v. *Louisiana*, 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417 also does not bear any reasonable resemblance to the factual situation in this case. There, a confession of the defendant was publicized at various times over the local television station, and members of the jury had seen and heard the same, and further, two members of that jury were deputy sheriffs of the parish in which the defendant was being tried.

Petitioner cites a number of cases rendered by the Mississippi Supreme Court, all of which are merely proof that the said court gives careful consideration to each case where this issue is raised. Such consideration was given in this case, and the Mississippi Supreme Court, finding no abuse of discretion on the part of the trial court, properly affirmed the conviction and sentence.

CONCLUSION

Respondent avers that petitioner has wholly failed to meet the burden of proof required of him to show that he has been denied his constitutional right to trial by a fair and impartial jury, and, as a consequence thereof, his petition for a writ of certiorari to this court should be denied.

Respectfully submitted,

A. F. SUMMER
Attorney General

By: J B Garretty
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Special Assistant Attorney General

Restraint praised, more restraint asked

A week after the senseless killing of an 18-year-old black girl, Jo Etha Collier, the night of her graduation from Drew High School, Drew is easing out of the national headlines into a period of quiet but tense confrontation.

Monday, it took the form of an attempt by blacks to enter Gene's Drive-in dining room on Highway 49. The owner closed the drive-in and the blacks sat down around the entrance.

Later, he opened the cafe and the sequence was repeated.

As of press time Tuesday morning, the cafe owner had not announced what his plans will be.

Drew Mayor W. O. Williford had praise for the conduct of the people of all races during the week and urged them to use restraint during the coming week.

"I would like to express my appreciation to all the people of Drew for the way they have conducted themselves in these trying times -- Pm speaking to the people of all races," said the mayor. "They have shown by their actions that we all want peace and harmony in the community and law and order."

Only one person was arrested in Drew during the week.

The three suspects charged in the killing and being held in the state penitentiary at Parchman were arrested by law officers in Cleveland the night of the killing.

Isaiah Parsee, an out-of-town black described as an agitator, was picked up but released after Thursday's unruly demonstration, and it was reported that he left town directly afterwards, partially as a result of the advice of black leaders.

During the coming week, Mayor Williford said that he hopes people will continue to use restraint.

"Everybody let their level heads prevail and try to promote peace and harmony in the community," he said. "Please try to hold your tempers. Please remember that we are all supposedly educated, intelligent people and let's use good judgement."

Of the death of Miss Collier, who had received an award for best attitude at school awards night, Mayor Williford said, "There's nobody who regrets the death of this young girl more than I do, and my sympathies go out to the family and friends."

Authorities will comment little for publication on the evidence against the three men being held in Parchman on murder charges. They're afraid that they will hurt their case in court by releasing any evidence before the case comes to trial.

Arrested at 2 a.m. Wednesday, after the shooting took place at about 9:45 Tuesday evening, were Wesley Parks, 26, of 2196 Theda in Memphis, Wayne Parks, 25, of near Drew, and their nephew, Allen Wilkerson, 19, of Memphis.

Recovered from their car was a .22-caliber pistol reportedly belonging to Wesley Parks -- were a "riot gun" (a shotgun with a short barrell), a 22-caliber automatic rifle, and a knife, it was reported.

Two of the men were reportedly "moderately intoxicated" at the time of the arrests while the other appeared not to be.

The funeral Sunday afternoon at Drew High auditorium, went off quietly, except for getting started about an hour and a half late.

For Mayor Williford and Police Chief J. D. "Dink" Fleming, it has been a 120-hour-long work week. Speaking of Fleming, Williford said, "He's done a really outstanding job. Not many people have been exposed to the problems like he has been called on to meet and he's come through without a bobble."

...ers at Drew are named

...all for the county," said Mr. ...rett.

...delayed the tournament about 1 and 1/2 hours Sunday.

...Third flight: 1st place, E. V. Chapman of Marks; second ...place, Melvin Congleton of Drew.

A prize for the longest drive ...

Eula Patt, Jimmy Perkins, and Richard Williamson.